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No. 87-631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE COASTAL CORPORATION,
COASTAL STATES MARKETING, INC.,
BELCHER OIL COMPANY,
THE BELCHER COMPANY OF NEW YORK, INC.,
BELCHER NEW ENGLAND, INC. and
BELCHER NEW JERSEY, INC.,

Petitioners,

v.

APEX OIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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November 30, 1987

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Pursuant to Rule 22.5, Petitioners The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc., and Belcher New Jersery, Inc. (hereinafter, collectively, "Belcher" or "Petitioners") respectfully submit this reply brief to address arguments first raised by the brief in opposition of respondent Apex Oil Company (hereinafter, "Apex" or "Respondent").

1. Respondent Improperly Attributes the Actions of Dismissed Defendants to Belcher.

The District Court explicitly found, and the Court of Appeals affirmed, that long defendants Stinnes, Warren, and Eastern[1] each acted independently.[2] After the Court of Appeals' ruling, only Northeast, Global, and Belcher remain as possible members of the alleged conspiracy (32a). Respondent ignores this fact, and thereby exaggerates the scope and nature of actions taken by Belcher and its alleged co-conspirators. For example, respondent quotes a statement by the Court of Appeals that "Apex paid prices as high as 97.5¢ per gallon to several long defendants for oil" (14a)[3], but neglects to mention that the so-called "high" price of 97.5¢ per gallon was, in fact, attributable to sales by Stinnes and Eastern—parties held to have acted independently (50a-51a).[4]

Similarly, respondent's references to the Court of Appeals' calculations of early nomination patterns of the "long defendants" are not probative, for these calculations also

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[1] The term "long defendants", as used by the courts below, includes companies which held long positions in February 1982 futures contracts for No. 2 heating oil and their parent corporations: (i) Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively, "Northeast"); (ii) Global Petroleum Corporation ("Global"); (iii) Belcher; (iv) Stinnes Corporation and Stinnes Interoil, Inc. (collectively, "Stinnes"); (v) George E. Warren Corporation ("Warren"); and (vi) Eastern of New Jersey, Inc. ("Eastern"). The "long defendants" also includes brokers which represented some of these companies: (i) Joseph DiMauro ("DiMauro"); (ii) Triad Petroleum, Inc. ("Triad"); and (iii) TIC Commodities, Inc. ("TIC").

[2] The brokers DiMauro, Triad, and TIC were also found to have acted independently.

[3] Numbers in parentheses followed by "a" refer to pages in the Appendix to the Petition.

[4] Respondent's Brief in Opposition at 5 (hereinafter cited to as "Apex Opp. at ____"). Significantly, Belcher sold no oil to Apex, and took delivery of its contracts at dates later than it had originally nominated (Petition at 5; Joint Appendix at A-6104, 6305).

include figures relating to the dismissed defendants.[5] Stinnes, Warren, and Eastern were found to be independent actors; accordingly, their nomination patterns could not be grouped with those of the remaining alleged conspirators.

In all events, the factual matters now raised by Apex are irrelevant to the issue of Belcher's liability. The Court of Appeals found all the evidence amassed by Apex concerning actions against economic interest to be ambiguous (20a-21a). As to the early nominations, the Court pointedly stated that "the demand of early delivery, by itself, creates no dominant inference" (24a). Similarly, the Court noted that since early nominations became public knowledge, it would be consistent with permissible competition for a long to be inflexible, *i.e.*, to maintain its nomination (31a). Contrary to respondent's assertions, factual disputes are not before this Court.[6]

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[5] In our petition for rehearing to the Second Circuit, we argued:

> Relying on the chart prepared by Apex (A-4369), the Court stated that 'the non-defendant longs nominated only 15% of their contracts for delivery for the first two days (19% in the first three days).' Slip Op. at 3756. The information on the chart shows that if the nominations of the dismissed defendants for the first two and three days are included with those of the longs who were not defendants, the parties holding long positions (other than the putative conspirators) nominated 27.58% (960 out of 3481 contracts) of their contracts for delivery for the first two days and 30.55% (1063.5 out of 3481 contracts) for the first three days, more than twice the amount calculated by the Court. Further, since the Court used its calculations to infer that Northeast and Global (but not Belcher) were parties to a 'conspiracy', the proper analysis would be to compare the early nominations of *all* non-conspiring longs, including Belcher, with the nominations of Global and Northeast.
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> Petition For Rehearing With Suggestion For Rehearing In Banc On Behalf Of Belcher, at 13-14.

[6] Respondent argues, incorrectly, that consideration of the petition would engage this Court in a lengthy re-evaluation of the evidence considered below. The two courts below agreed that the vast majority of the "evidence" proffered by respondent was non-probative of concerted action. Only two bits of evidence remain

(footnote continued on next page)

2. Respondent Misapprehends This Court's Decision in Monsanto.

Respondent argues that the Court of Appeals did not misapply this Court's ruling in *Matsushita*[7] and, consequently, the court below did not place itself in conflict with this Court or with other circuits. Respondent does not contest, and thereby concedes, that a misapplication of *Matsushita* below would reflect a conflict among the circuits—as we have argued in our petition.

Respondent attempts to reconcile the Court of Appeals' decision below with the principles of *Matsushita* by misreading this Court's decision in *Monsanto*.[8] From *Monsanto*, respondent claims to discern a theory of antitrust analysis which permits a § 1 antitrust case to proceed to a jury even where the evidence as a whole is incapable of supporting a *dominant* inference of concerted action—a proposition at odds with the clear language of *Matsushita* and that of *Monsanto* itself (Apex Opp. at 12-14).

The error in respondent's argument lies in its focus on the language of footnotes 12 and 14 in *Monsanto*, while failing to consult the main body of the opinion (Apex Opp. at 16). Footnote 12 stated that a jury may determine the source of complaints received by the manufacturer about its former distributor's prices. 465 U.S. at 767, n.12. Similarly, footnote 14 stated that a jury may decide whether or not complaints were made during the 15 months prior to the distributor termination and whether or not prices stabilized after 1968. *Id.* at 769, n.14. Both footnotes involved conflicts over the existence of specific underlying facts, not over

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(footnote continued from preceding page)

(32a, 92a-93a), namely, those discussed in our petition (at pp. 8-20).

[7] *Matsushita Electric Industrial Co.*, v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986).

[8] *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

the ultimate distinction between concerted and independent action.

As to the distinction between concerted and independent action, *Monsanto* clearly held that "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently". *Matsushita*, 106 S.Ct. at 1357, *quoting Monsanto*, 465 U.S. at 764. Accordingly, respondent is not entitled to go to the jury where the evidence as a whole remains as consistent with an inference of independent action as with an inference of concerted action. As *Monsanto* recognized and *Matsushita* clearly states: "The antitrust law[s] limit[ ] the range of permissible inferences from ambiguous evidence in a § 1 case." 106 S. Ct. at 1357. Where, as here, the evidence was not, and *was not held to be*, capable of a *dominant* inference of concerted action, the case may not proceed to trial (Petition at 8-20).

3. Certiorari is Appropriate Following Denial of Summary Judgment in Order to Secure Uniformity of Decision Among the Circuits and to Address Issues of Public Importance.

Respondent suggests that a grant of certiorari is inappropriate here because the denial of summary judgment below has no preclusive effect on petitioner's ability to vindicate its rights at trial (Apex Opp. at 16). Yet where there are issues of public importance or a conflict among the circuits, this Court has not hesitated to grant certiorari because of the interlocutory status of a case. Indeed, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), a case cited by respondent, states that certiorari jurisdiction will be exercised "in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Matsushita* itself involved a grant of certiorari following the denial of summary judgment. In view of the enormous expenditure of judicial effort which must be devoted to antitrust conspiracy trials and the need for uniformity of decision in this important area of antitrust law,

we respectfully submit this matter is of such exceptional importance as to warrant review by this Court.

Conclusion

For the foregoing reasons and those set forth in the petition, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

November 30, 1987

Respectfully submitted,

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